



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2005

Ms. Marquette Maresh
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2005-00617

Dear Ms. Maresh:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217180.

The Lockhart Independent School District (the "district"), which you represent, received a request for attorney fee bills related to litigation involving the Caldwell County Appraisal District. You state that the district has released some responsive information, but you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, rule 192.5 of the Texas Rules of Civil Procedure, and rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that the submitted information labeled Exhibits 5 and 9 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2004-8512 (2004). With regard to the information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides that “the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law: . . . (16) information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege[.]” Gov’t Code § 552.022(a)(16). Therefore, information within these fee bills may only be withheld if it is confidential under other law.

Sections 552.103, 552.107, and 552.111 are discretionary exceptions to public disclosure that protect the governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of the submitted attorney fee bills under section 552.103, 552.107, or 552.111 of the Government Code.

You also claim the attorney-client and work product privileges under section 552.101 of the Government Code and the Texas Rules of Evidence and the Texas Rules of Civil Procedure. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2 (“We find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101’s purview”). However, the Texas Supreme Court has held that the Texas Rules of Evidence and Civil Procedure are “other law” that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will consider whether rules 503 and 192.5 are applicable to the submitted information at issue.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that Exhibits 6-8 and 10 contain confidential communications between representatives of the district and its attorneys. Based on your representations and our review of the submitted information, we agree that the attorney fee bills at issue contain information that is protected by the attorney-client privilege. We have marked the information the district may withhold pursuant to rule 503 of the Texas Rules of Evidence.

We next address your claim under rule 192.5 regarding the remaining submitted information. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and

(2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the information in Exhibits 6-8 and 10 is protected by rule 192.5. Upon review, however, we find that the fee bills in Exhibits 6-8 and 10 do not reveal any mental impressions, opinions, or conclusions of district attorneys regarding legal issues, strategy, or objectives. We therefore determine that none of the information at issue consists of core attorney work product, and we find the district may not withhold any of the remaining submitted information pursuant to the attorney work product privilege under rule 192.5.

In summary, with regard to the submitted information that is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2004-8512 (2004), you must continue to rely on that ruling as a previous determination. We have marked the portions of the remaining attorney fee bills that are protected by the attorney-client privilege and may be withheld under rule 503 of the Texas Rules of Evidence. The remaining information at issue must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

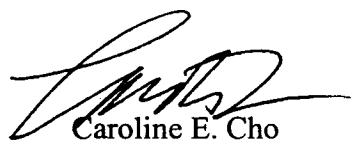
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 217180

Enc. Submitted documents

c: Ms. Julie Daffern
Lockhart Times-Sentinel
101 East San Antonio
San Marcos, Texas 78666
(w/o enclosures)